ADDRESS OF PROF. JOHN H. LATANÉ, OF WASHINGTON AND LEE UNIVERSITY,

ON

The Question of Domicile in Its Relation to Protection.

A state has the undoubted right to extend protection to its citizens abroad when justice has been denied them or palpable injustice done them. Citizenship, however, is determined by municipal and not by international law, and since the laws of different countries are often in direct conflict, the citizenship of a given person may be a matter of dispute. Such cases usually arise out of a change of domicile. Domicile is defined by Story as the place where a person has "his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." Thus a person may be a citizen of one country, have his domicile in another, and temporarily reside in a third.

Under what circumstances does a person lose his nationality of birth, or forfeit his right to the protection of his native state? A change of domicile does not of itself effect a change of nationality. In rendering a decision for the Mexican Claims Commission of 1868 Dr. Lieber said:

> Domicile in a foreign country does not denationalize, unless there be a distinct law to that effect in the native or adopted country of the respective person.[1]

Some states provide by statute that subjects who emigrate to foreign countries shall forfeit their citizenship after the lapse of a given number of years. For instance, a German subject who has lived abroad for ten years without taking any steps to retain his citizenship forfeits it and with it all right to national protection. Similar provisions occur in the laws of most European countries, but not in the laws of England or the United States.

Although Congress asserted in 1868 the abstract right of expatriation as a fundamental principle of this government, it did not then, nor indeed until the act of 1907, determine when or under what circumstances a native born citizen of the United States shall

[1] Moore, International Arbitrations, III, 2706.

be deemed to have lost his citizenship. In the absence of a statutory definition of the modes of expatriation the State Department has had to decide individual cases as they have arisen on their merits, and the opinions of the different secretaries have not always been consistent. It has frequently been held that long continued residence abroad creates a presumption that citizenship has been abandoned and that evidence must be adduced to the contrary before protection will be extended. A few quotations from the instructions of the Department will suffice for purposes of illustration:

Mr. Webster said in 1851:

You inform us that many American citizens have gone to settle in the Sandwich Islands; if so they have ceased to be American citizens. The Government of the United States must, of course, feel an interest in them not extended to foreigners, but by the law of nations they have no right further to demand the protection of this government.[2]

Mr. Everett held in 1853 that

the presumption of abandonment of nationality by long residence abroad is rebutted by proof that such residence was that of a missionary who neither intended to relinquish his nationality nor abandon the intention of coming home.[3]

Mr. Marcy held in 1855 that

Persons voluntarily emigrating from the United States to take up a permanent abode in a foreign land cease to be citizens of the United States, and can have, after such a change of allegiance, no claim to protection as such citizens from this government.[4]

Mr. Seward declared in 1862:

The citizen of the United States who becomes domiciliated in another country, contributing his labor, talents, or wealth, to the support of society there, becomes practically a member of the political state existing there, and for the time withdraws himself from the duties of citizenship here, and consents to waive the reciprocal right of protection from his own government.[5]

[2] Moore, Dig. Int. Law, III, 758.
[3] *Ibid*, 759.
[4] *Ibid.*
[5] *Ibid*, 760.

Mr. Fish wrote in 1870:

Although it may be that you have not by any formal act of naturalization renounced your allegiance to the United States, a residence of so long continuance in Hayti raises a strong presumption that you have incorporated yourself into the permanent population of the island and ceased to regard yourself as subject to the duties of a citizen. It will be regarded as quite material in respect to your national character to know whether you have complied with the provisions of the acts of Congress passed in 1862 and subsequent years imposing an income tax upon citizens residing abroad.[6]

Mr. Fish stated the same principle still more clearly in 1871:

Citizenship involves duties and obligations, as well as rights. The correlative right of protection by the government may be waived or lost by long continued avoidance and silent withdrawal from the performance of the duties of citizenship as well as by open renunciation.[7]

Mr. Evarts held in 1879:

While expatriation may be, and sometimes is presumed from that circumstance (continued residence in another country), it is by no means conclusive of the fact. A citizen of the United States may be absent from his country for an indefinite period for purposes of education, of business, or of pleasure, and so long as he does no act or assumes no obligations inconsistent with his native or acquired citizenship in this country, he is not held under our laws to have forfeited any of his rights as a citizen of the United States.[8]

The doctrine enunciated in the latter part of this statement is still more clearly expressed by Mr. Bayard in 1887:

This government, maintaining the doctrine of voluntary expatriation, has always held that its citizens are free to divest themselves of their allegiance by emigration and other acts manifesting an intention to do so. Mere residence abroad is not, however, construed as an abandonment of allegiance. It is only when such residence is accompanied by acts inconsistent with allegiance to the United States or indicative of an intention to abandon it, that this government holds it to have been renounced.[9]

[6] *Ibid*, 762.
[7] *Ibid.*
[8] *Ibid*, 717.
[9] *Ibid*, 584.

In some of the above utterances there appears to be a tendency to generalize on a single case and a failure to distinguish between loss of nationality and loss of right to national protection. As long as a person retains a given nationality he has the right to appeal to his government for protection, but that government must decide for itself whether it is right or expedient to interfere in his behalf. Protection may be extended to an individual under one set of circumstances and denied to the same individual under another set of circumstances. The forfeiture of the right to protection in a given case does not imply a general loss of the right to protection on the part of the individual concerned, for nationality and protection are coincident.

The act of 1907 has relieved the State Department of some of its difficulties by providing

That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

It would appear that under this act the citizenship of native born Americans can not be abandoned except by a positive act of allegiance to some other power. Long continued residence abroad unaccompanied by such an act can not now as formerly create a presumption that citizenship has been abandoned.

Under the act of February 10, 1855, children born to citizens domiciled abroad are citizens of the United States, "but the rights of citizenship shall not descend to children whose fathers never resided in the United States." In order to retain their American citizenship, children born abroad of American parents are required by the act of 1907 upon reaching the age of eighteen years to record at an American consulate their intention to become residents of the United States, and they are further required upon attaining their majority to take the oath of allegiance to the United States. This requirement is in reality a special form of naturalization provided for children born abroad of American parentage.

Acquired nationality is, as a general rule, more easily lost than nationality of birth. The act of 1907 provides that

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen,

but this presumption may be overcome by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States. With this exception, there has never been any distinction in our laws, so far as their status abroad is concerned, between native born and naturalized citizens, and the latter have been entitled in legal theory to just as full protection abroad as the former, even in the country of their origin, but practically certain difficulties have arisen, particularly in connection with those countries which require military service of all citizens, which have made it impossible to live up to the theory. In the case of young men who have come to this country and taken out naturalization papers before performing military service and then returned to their native land, we have found it impossible successfully to assert our doctrine of expatriation. The American doctrine as embodied in the act of 1868 is that naturalization effects a complete change of allegiance and absolves the individual from all obligations to the country of his birth. The opposing doctrine is that naturalization merely adds a new allegiance to the old and does not absolve the individual from obligations to his former sovereign; that he becomes subject to a dual allegiance; and that when he comes within the jurisdiction of his native government he may be required to fulfil duties which he would have been held to had he resided there continuously. Since 1872 we have practically, though not theoretically, acquiesced in this view. We have not been willing, however, to embody it in treaties, and that accounts for the fact that the negotiation of naturalization conventions so auspiciously begun in 1868 came to a sudden end. No naturalization treaties have been negotiated since 1872 except the one with Hayti and the recent treaties with Portugal, Uruguay, Salvador, and Peru.

The rule as to the loss of acquired citizenship and the right to protection does not apply to naturalized citizens who reside abroad as agents of American business houses. It is a common practice of

commercial houses to send abroad natives of the countries with which they have trade relations. With reference to the issuance of passports to naturalized citizens Secretary Olney said in 1896:

In cases of representative business agencies abroad, the Department does not exact a declaration to return at a fixed time, but it does require a declaration of a fixed intent to return some time, which intent shall not be negatived by the obvious circumstances of the applicant's domicile abroad.[10]

The only clear case in which domicile is a test of national character is that of citizens of neutral countries carrying on business in belligerent communities. Domicile in a belligerent country imparts to the citizen or subject of a neutral state the character of an enemy, and renders his property subject to condemnation under the usual rules of war.

Where an individual possesses no nationality under municipal law, domicile may under international law invest him with a nationality. This doctrine was advanced by Mr. Marcy in the celebrated case of Martin Koszta. Koszta was an Austrian subject who took part in the Hungarian revolution of 1848–49, and at its close took refuge in Turkish territory. Austria demanded his extradition, but Turkey refused to surrender him. The Austrian Government then issued a formal decree of banishment against him. From Turkey he came to the United States and made a declaration of intention to become an American citizen. Nearly two years later he returned to Turkey on private business and placed himself under the protection of the American consul in accordance with the local custom which permitted Franks or sojourners to place themselves under the protection of the representative of any of the Western or Christian Powers. When on the point of returning to the United States he was seized at Smyrna by a band of ruffians, who, it appeared later, were instigated by the Austrian consul, and thrown into the sea. He was picked up and taken abroad the Austrian warship Huszar and confined in irons, the intention being to take him to Austria. The American chargé at Constantinople and the

[10] Moore, Dig. Int. Law, III, 773.

American consul at Smyrna both demanded his release, but without success. Just at this juncture the American war vessel *St. Louis* arrived on the scene and Captain Ingraham demanded Koszta's release under threat of resorting to force. In order to avoid a conflict in the harbor at Smyrna, Koszta was by mutual consent placed in the custody of the French consul-general pending the conclusion of an agreement between the United States and Austria. Mr. Marcy justified Captain Ingraham's conduct and demanded that Koszta be handed over to the United States. He held that Austria had no right to complain of a violation of Turkish territory; that the United States stood ready to make all necessary explanations to Turkey, but that no explanations had been so far demanded; that as the case arose in the territory of a third Power it could not be settled either by Austrian or American law, but only by international law; that Koszta's connection with Austria had ceased by virtue of his emigration and banishment; that though not a citizen of the United States under its municipal law, he might under international law acquire national character from domicile; and that even if this were not the case, he was clothed with American nationality as soon as he placed himself under the protection of the American consul. After a lengthy correspondence between the two governments, Koszta was finally delivered into the custody of the United States and brought to America.

That the acquirement of a domicile in the United States coupled with the declaration of intention to become a citizen may confer on an individual national character before the completion of the process of naturalization is clearly recognized by the provisions of the act of 1907 in regard to passports:

> Where any person has made a declaration of intention to become (a citizen of the United States) as provided by law and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of the government in any foreign country: *Provided,* That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention.

With the free movement of population from one country to another to meet the demands of the modern conditions of life, it becomes increasingly necessary that questions arising out of a change of domicile should be settled on a permanent basis. International law can not undertake to decide the citizenship of individuals. It can not make or unmake citizens. Citizenship is a question of municipal law. States can, however, by treaty, agree to adopt the same rules in regard to change of allegiance and thus avoid the conflicts that now arise. The main obstacle appears to be the claim of the Continental Powers to demand military service of all young men on arriving at a certain age. We have been forced as a matter of practice to concede this point, and there would appear to be no serious objection to embodying it in treaties.

The CHAIRMAN. I understand the rule, in our proceedings here, to be that after the reading of papers is concluded a discussion of the theme that has been developed in those papers is open to the members on the floor, in speeches not exceeding ten minutes.

I would like to ask Professor Latané, for my own information, in regard to the act of 1907 to which he alluded, as fixing the evidence that shall determine the status of an American citizen who intends to expatriate himself, and whether anything except naturalization in a foreign country is evidence of that fact.

Professor LATANÉ. The statute provides for his being naturalized and taking the oath of allegiance. Sometimes a persons accepts office under a foreign government and simply takes the oath of allegiance without becoming naturalized. Those are the only two provisions mentioned in the statute, and I would infer that there could not be any presumption of abandonment of citizenship, except for those two acts.

Mr. FOSTER. Mr. President and Mr. Chairman: There seems to be a disposition among the members not to talk about this subject. I thought men educated in this profession were generally inclined to talk.

It occurred to me, during the reading of the letter, the author of which was born in a foreign country, there was manifested an un-

necessary sensitiveness about his renunciation of his allegiance to the government to which he first owed his obligation of citizenship. I do not recall the language of the oath which is taken; but my recollection is that it simply renounces any allegiance to any foreign prince, potentate, or power.

Can there be anything like a double allegiance? Can a German who comes to this country and becomes an American citizen have any allegiance to the Emperor of Germany?

I speak rather freely on this subject because I am the son of a foreign-born citizen. My father was born in England. It is true that he came to this country when he was quite young and he became a naturalized citizen of this country, and I am quite sure he gave up all allegiance to the mother country when he became a citizen of America. I never knew a man who was more patriotic as an American citizen than he was, and that ought to be the spirit of every man who comes to this country and voluntarily assumes our citizenship.

I simply want to remark that I would have liked to ask the author of the letter his view of that subject, if he were present. As he is not present, I thought I would make the point. I think he is manifesting undue sensitiveness on the subject.

Mr. W. H. Dennis. Mr. Chairman: I might say, as an humble contribution to the facts which have been brought out this evening, that we have encountered in the District of Columbia a curious phase of the question with which Professor Latané dealt. The question arose in regard to admission to the bar. We have a great number of applicants who come here from widely different regions, and some of them are in a somewhat embryotic condition of citizenship. They have declared their intention of becoming citizens, but are unable to go further on account of the requirements of a certain lapse of time of residence in this country. We have had to argue that question before the court for its information, as to whether they could be admitted to the bar under those circumstances.

By analogy to the Koszta case and analogy to the statute in regard to holding real estate in the District of Columbia, which provides

that those who have declared their intention of becoming citizens shall have the same right to hold real estate as citizens, the court here was led to admit men who are in that ambiguous position. It struck me, when the letter was read by Professor Scott, that these men were in such a difficulty as he indicated, and that they were neither one thing nor the other, neither fish, flesh, nor fowl. It appeared to me that the remedy he suggested would be very applicable to that difficulty.

I merely suggest this as one phase of the general question of naturalization and partial naturalization.

Dr. MERRILL E. GATES (ex-President of Amherst College). Mr. Chairman: While the question of embryonic citizenship is before us, I would like to call attention for a moment to a body of residents in this country, numbering from two hundred and fifty thousand to three hundred thousand, whose history presents anomalous phases of gradual progress towards citizenship. In questions of allegiance, sovereignty, and citizenship, their history is an interesting study. I refer, of course, to the native American Indians.

Some of the older members who are present may recall the fact that Daniel Webster attempted in vain to define the position of the Indian with reference to citizenship. After Webster had exhausted his skill in the vain attempt, he fell back upon an old legal phrase and denominated the Indians, "perpetual inhabitants with diminutive rights." General Caleb Cushing styled the Indians "domestic subjects." The Indian was not a citizen. He had not the right to vote, and he could not in any way acquire that right. "Indians not taxed" were expressly excluded from the number of those who were accounted citizens and might be electors. Yet the Indian was not a foreigner. He was not an alien; and he could not by naturalization become a citizen of the United States. He did not owe, and he had never owed, allegiance to any foreign sovereign power. He was a native-born American, as were his parents; but he was not a natural-born citizen. Yet he was not born under any other government than our own; and while in our early history we made treaties with Indian tribes, the Indian tribe has never been recog-

nized as a "state" in the proper sense of the term, with which treaties can be rightly made. Until 1887, we had said to hundreds of well-educated men of Indian blood, "You are native-born Americans; yet no matter how worthy of citizenship you prove yourselves, you can not by any possibility become citizens of the United States. The negroes, who are your emancipated freed-men, are citizens, and the door of naturalization is open to any foreigner who will live among us six years, it matters little how vicious or ignorant he may be; but that door is shut and barred against you."

Captain Pratt, the head of the Carlisle Indian School, used to take, in imagination, a boat load of his educated young Indians out into the harbor of New York, as a big steamer was coming in with hundreds of immigrants on its decks. "Any one of those ignorant foreigners, from all parts of Europe," he would say to these Indians, "may become an American citizen; but you, the only original Americans, can not in any way become American citizens."

Not only were the Indians shut out from the privileges of citizenship, but there was no way provided for them to secure those rights in our courts which are uniformly conceded to aliens resident among us. An Indian could not appear in court; nor could an attorney appear for him unless especially ordered so to do by the Secretary of the Interior through the Indian Bureau.

In 1869 the United States Board of Indian Commissioners (of which I have been a member for the last twenty-six years) made the first draft of a bill to allot land in severalty to Indians. It required nearly twenty years of steady agitation before the public opinion of the country was sufficiently educated to force the passage of the Severalty Act. In March, 1887, the General Severalty Act for Indians was passed. It had been perfected in form by Senator Henry L. Dawes, of Massachusetts, the weight of whose character and the strength of whose influence rendered possible the passage of the act at that time. By this act a homestead of land was given as an individual allotment to each Indian of a tribe which had been declared fit for allotment, and every man, woman, and child who received an allotment of land under the Dawes Act thereby immediately became a citizen. The government, upon allotment, gave to

each Indian a "protected title" which rendered his land inalienable and nontaxable for a period of twenty-five years; but from the date when he received the allotment, the Indian became a citizen with the right to vote. About one hundred thousand Indians have been made citizens under that law.

In 1872 (to refer for a moment to the question of "Treaties with Indian Tribes," alluded to by Professor Minor in his paper yesterday) Congress declared that no more treaties should be made with Indian tribes, as such; and that these tribes should not be even inferentially regarded, hereafter, as "states" or nations with whom treaties could be made. The attempt to regard an Indian tribe as a "foreign state" existing upon United States territory, yet having an *imperium in imperio* of its own, had led to so many patent absurdities, that Congress did away with the last vestiges of that attempt in 1872. But the Five Civilized Tribes of Indian Territory and Oklahoma were left outside the Severalty Act; and, protected by well-drawn treaties, were still to be reckoned with before they could become citizens of the United States.

What is known as the Curtis Act, carrying the name of one of the two distinguished Senators of the United States (Senator Curtis and Senator Owen) who are Indians by birth and by tribal rights, conferred citizenship upon about one hundred thousand more of our three hundred thousand Indians, namely, upon those Indians who were members of the Five Civilized Tribes and were residents of Oklahoma and the Indian Territory, and are now citizens of the State of Oklahoma and of the United States. There remained about one-third of our Indian population still to be dealt with.

In May, 1906, the provisions of the General Severalty Act were superseded by what is known as "The Burke Law." Under the operation of that law an allotment of land made to an Indian does not carry with it citizenship for the Indian, as it did under the Dawes General Severalty Act. The United States under the Burke law gives to the allotted Indian a protected title, which makes his land inalienable and nontaxable for twenty-five years, unless, before that time shall have expired, the allotted Indian shall apply for citizenship and the Secretary of the Interior shall be of the opinion

that said Indian is competent to become a citizen, and shall thereupon give him a patent in fee simple to his allotted land, thereby making him a citizen. Under the operation of the Burke law the remaining one hundred thousand Indians who are not yet citizens are very slowly coming into citizenship.

These facts illustrate the successive stages along the line of gradual approach to citizenship for the three hundred thousand native-born American Indians who are not only the original, but the *aboriginal* Americans, yet who are to be the very last class of residents upon our territory fully admitted to the rights and privileges of citizenship.

Mr. MARBURG. I want to make one point in regard to Mr. Macvane's paper with reference to a shorter period in order to entitle a foreigner to citizenship. I simply want to call attention to the fact that nowhere in Europe is there such a tide of immigation to any one country as there is to the United States, and on that account precedents ought not to have so much weight with us. Here we have certain problems to deal with which they do not face.

There is a distinct growth of socialism in this country, in the last few years. For example, since the retirement of Mr. John Mitchell from the presidency of the Miners' Association that body has pronounced itself as in favor of socialism, and they are very strong about it. That is only a straw to show which way the wind blows. There is a distinct growth in other directions. We see that Milwaukee has been captured by the socialists.

In the city of Paris, which has been partially governed by a municipal council which has been socialistic for some years, that council is subject to the Prefect of the Seine, appointed by the central government, which is a protection, in a big city like Paris, against carrying out socialistic ideas. We have no such protection here.

We hear a great cry for local self-government in the cities, a cry which, I think, is not well founded because of that very danger. On that account we ought to move very cautiously in granting citizenship to a foreigner who comes here without a knowledge of the spirit

of our institutions, with reference to the time for him to acquire that knowledge.

Mr. RALSTON. Mr. Chairman: I just want to say one word on the general branch of the subject which is under discussion, and which, perhaps, is not entirely met in the very interesting paper by Professor Latané.

The paper has discussed the question of protection, and the ideas of the various Secretaries of State as to persons to whom protection should be granted. That same question has repeatedly come before arbitral tribunals.

Before the Mexican and American Claims Commission, of 1868, the question was raised repeatedly as to whether a person who had merely made a declaration of intention to become a citizen of the United States was entitled to be heard as a claimant. The same question has arisen before other tribunals.

As to that particular point, I think there has been a unanimity of decision that those who had merely declared intention to become citizens should not be recognized as proper claimants before an institution of that character. But there have been very interesting qualifications of that rule, at least as declared by commissions and umpires. The particular titles of the cases do not occur to me at this moment; but persons who are fully entitled to the protection of the United States and occupy a status less than that of citizenship have been heard and have recovered. For instance, probably fifty or sixty years ago a negro who was, under the circumstances, not recognized as a citizen of the United States but was fully entitled to the protection of the United States, succeeded in recovering an arbitral award.

So, in another case, a sailor upon an American vessel was recognized as being under the protection of the American flag and an injury done to him or to his ship at that time, resulting in damage to him, was regarded as something which was entitled to be properly compensated for, in a tribunal of that character.

Of course much may depend, in the particular instance, upon the nature of the protocol creating the commission; but it is, I think, somewhat interesting to note the attitude that arbitral tribunals have found it necessary to take upon a branch of that particular question.

Professor LATANÉ. With reference to the Mexican Claims Commission of 1868, there was rather a curious distinction drawn. They held that where a man had made a declaration of citizenship and of his intention to become a citizen, but had not carried it out, he was not entitled to recover; but that where he had made the declaration and subsequently to the time when the claim arose he had perfected his citizenship he was entitled to recover.

Mr. RALSTON. Just a word on that point. One or two of the earlier decisions of the Mexican Commission did recognize the right to recover upon the part of one who had merely made a declaration of intention; but I think that beyond those one or two decisions the precedent was never followed in the commission. I may say that the position taken in the commissions may prove somewhat interesting to us in the future in determining the status or possible status of the inhabitants of Porto Rico, who are not recognized as citizens of the United States, but are persons entitled to the protection of the United States.

The CHAIRMAN. Are there any further remarks upon the subject of the papers just read? If not, we will advance to the second question for the evening, which is *The effect of the unfriendly act or inequitable conduct of the citizen upon the right to protection,* and on that subject we will have the pleasure of hearing from Prof. Theodore S. Woolsey.

ADDRESS OF PROF. THEODORE S. WOOLSEY, OF YALE UNIVERSITY,

ON

The Effect of the Unfriendly Act or Inequitable Conduct of the Citizen upon the Right to Protection.

Allegiance and protection, as we shall be reminded more than once during this meeting, are correlative.

They are correlated in that each implies an obligation, but with this difference, that whereas the duty of fidelity involved in allegiance is absolute and unconditional, the duty of the state to protect the person and property of its subject abroad is not absolute, but may be conditional in a variety of ways.